

## Section 4.5

### Hearing Scheduling Difficulties

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#### Questions posed at the Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable:

- What recourse does the county have if the Respondent requests a hearing, but does not return the county's calls to schedule a hearing?
  - If a hearing has been scheduled, when and how many times are appropriate for the county agricultural commissioner (CAC) to reschedule a hearing at the request of the Respondent?
  - What happens when the Respondent fails to appear for the scheduled hearing?
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#### Introduction

When the Respondent has been charged with a violation, he/she has the right to be heard (due process). If the Respondent timely requested a hearing, the CAC will notify the Respondent of a hearing date and the case will be heard in front of a Hearing Officer.

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#### All cases

According to Food and Agricultural Code (FAC) section 12999.5(b), the person charged with the violation shall be given a written notice of the proposed action and has the right to request a hearing within 20 days after receiving the Notice of Proposed Action (NOPA). The NOPA shall be sent by certified mail to the last known address of the person charged and shall be considered received, even if delivery is refused or the notice is not accepted at that address. If a hearing is requested, notice of the time and place of the hearing shall be given *at least* 10 days before the date set for the hearing.

At the hearing, the person shall be given an opportunity to review the CAC's evidence and to present evidence on his/her behalf. If a hearing is not timely requested, the CAC *may* take the action proposed without a hearing.

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## Hearing Scheduling Difficulties, Continued

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**Respondent requests a hearing, but cannot be contacted to set a hearing date**

If the Respondent requests a hearing, but does not respond to calls from the CAC to set a convenient time or cannot be reached by telephone, a hearing notification letter should be sent to the Respondent's address by certified mail. In the letter, indicate the date, time, and location of the hearing. Be sure to indicate in the letter that any changes to the hearing date must be requested *in writing* and received by the CAC's office not less than five days before the scheduled hearing date, except in cases of emergency.

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**Hearing is scheduled; Respondent requests to reschedule hearing date**

A hearing date has been scheduled, but the Respondent asks that it be rescheduled. How many times would it be appropriate for the CAC's Office to reschedule the hearing?

This is at the CAC's discretion. It may be reasonable to assure the due process rights of the Respondent for the CAC to allow the Respondent to reschedule at least once. To grant second and any subsequent requests to reschedule would be in the discretion of the CAC. Factors to be considered include the length of the NOPA given to the county, the reason for the request, etc. Care should be taken to avoid the considerable costs of repeatedly rescheduling the hearing unless warranted by the facts of the situation. If a request to reschedule is denied, you should make it clear to the Respondent that he/she will only be provided with the statutorily required "opportunity to be heard" at the time scheduled and that the hearing will proceed whether or not he/she is in attendance.

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**Respondent is late for the hearing**

What if the Respondent appears, but is late for the hearing?

The Hearing Officer needs to be flexible in these situations. In most cases, the hearing should move forward.

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## Hearing Scheduling Difficulties, Continued

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### **Hearing Officer is late for the hearing**

What if the Hearing Officer is late and the Respondent, who appeared on time, leaves before the Hearing Officer arrives?

While this is unfortunate, it does *not* require the CAC to withdraw the action. The Hearing Officer should, of course, apologize and the CAC should reschedule the hearing.

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### **Hearing is scheduled; Respondent fails to appear**

If the Respondent fails to appear at the scheduled hearing, but calls on the day of the hearing to ask for a continuance, the Hearing Officer should consider whether there is good cause for continuance. Unless continuing the hearing would work a significant hardship on the county, brief continuances (i.e., one week to 10 days at most) should be granted. All factors should be considered including the reason for the failure to appear, the opportunity or lack of opportunity the Respondent had to attempt to reschedule, etc.

If it is decided that a continuance is unwarranted, then the hearing should proceed as scheduled. Even if the Respondent had previously made a written request that the hearing be rescheduled which was denied, it should be assumed that the Respondent will appear. If the Respondent was notified that his request to reschedule was denied, and still fails to appear, the hearing should proceed as scheduled.

It is unlikely that a final decision would be overturned if the CAC simply issued a final decision without taking testimony at the scheduled hearing. However, the most prudent course of action would be to proceed with the presentation of the county's case. Since all of the county's witnesses will be present and ready to proceed, the time and effort that would be expended making a record of the County's facts in support of the violation would be minimal. When the Hearing Officer goes on the record, it should be noted that the Respondent was given the opportunity to be heard, but has not appeared and has forfeited his/her rights to be heard and to an appeal. At the close of the hearing, the Hearing Officer should reiterate that the Respondent did not appear and has forfeited his/her rights to be heard and to an appeal.

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### **References**

- FAC section 12999.5
  - Hearing Officer Sourcebook, Second Edition, May 1995
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